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T.R.A. DOCKET ROOM

December 31, 2003

Chairman Deborah Taylor Tate
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: Complaint of US LEC of Tennessee Inc. Against BellSouth and Request
for Expedited Ruling and for Interim Relief
Docket No. ~~03-00369~~

03-00639

Dear Chairman Tate:

In connection with the above-captioned complaint, I would like to bring to your attention the attached Order recently issued by the North Carolina Utilities Commission.

In the Order, the North Carolina Commission found that US LEC of Tennessee Inc. "has established a likelihood of success on the merits" of its complaint against BellSouth (Order, at 7) and issued a preliminary injunction directing BellSouth, pending a final resolution of the case, "to return US LEC of Tennessee Inc. and its customers to the status quo that existed prior to [BellSouth's] decision not to perform Caller ID queries utilizing the TSI database." Order, at 10.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:


Henry Walker

HW/pp

Cc: Guy Hicks

return...The Companies may establish CCS interconnections either directly or through a third party. The Parties will exchange TCAP messages to facilitate interoperability of CCS-based features between their respective networks, including all CLASS features and functions, to the extent each party offers such features and functions to its own end users.

Before October of 2003, BellSouth would send a query to TSI via a TCAP message for the name of the US LEC customer each time its customer received a call from a US LEC customer, and TSI provided this information. By refusing since October to continue its practice, pursuant to contract, of asking for US LEC's customer names from TSI, BellSouth has breached and continues to breach its interconnection agreement with US LEC—which has inflicted, and continues to inflict, irreparable harm on US LEC.

As a consequence of BellSouth's action, US LEC's customers in North Carolina report that their names are not being delivered to BellSouth customers. They are unable to complete calls to BellSouth customers in North Carolina with Privacy Director features on their phones without first going through the tedious process of answering a recording asking for their names. Sometimes BellSouth customers with Caller ID service that does not include Privacy Director decline to answer the phone when the name is not given on their Caller ID display. US LEC believes that this has resulted in loss of business and damage to the customer's reputation and to itself. Some US LEC customers who are unable to have the Caller ID information delivered to BellSouth customers are of the opinion that US LEC service is inferior to that of BellSouth.

US LEC argued that BellSouth's conduct constitutes a failure to provide reasonable service and is unreasonably discriminatory. BellSouth has also violated its CNAM agreement with TSI, as well as its own interconnection agreement with US LEC. These actions have irreparably damaged US LEC. US LEC further argued that it has shown a likelihood of prevailing on the merits, and thus its complaint justifies injunctive relief.

In response to US LEC's filing, the Commission issued on December 8, 2003, an Order scheduling an oral argument on US LEC's Motions the following day.

On December 9, 2003, the same day as the oral argument, BellSouth made several filings: a Memorandum of Law in opposition to US LEC's Motions, an Answer, a Motion to Dismiss, and an Affidavit of Malika Blakely.

In the Memorandum of Law, BellSouth reviewed the standard for the issuance of a temporary restraining order (TRO) or a preliminary injunction—i.e., a showing by the plaintiff of a likelihood of success on the merits and the existence of irreparable loss unless the injunction is issued or if issuance is necessary to protect the plaintiff's rights—and found these elements lacking in US LEC's filings. BellSouth also argued that US LEC lacks standing in this case because US LEC is neither a customer nor a

party to any contract with BellSouth pertaining to the access or delivery of customer names, nor does it have a direct interest in or represent anyone with a direct interest in the subject matter. Instead, US LEC is seeking to force a regulated entity to pay an unregulated entity for an unregulated service pursuant to a contract which the Commission has not approved and over which it does not have jurisdiction. Even if US LEC has standing, it has not shown the existence of justiciable case or controversy.

In its Answer, BellSouth argued that it was providing reasonable telephone service and was otherwise complying with federal and state law and regulations, and it denied that its Caller ID services were being provided on an unreasonably discriminatory basis. BellSouth further argued that it complies with Section 5.5 of the interconnection agreement between itself and US LEC and that the reciprocal obligations under this Section are being met. BellSouth pointed out that the contract between TSI and BellSouth states [in the "Whereas" clauses] that "this agreement does not require either Party to query the database of the other Party," and, therefore, there has been no breach of contract between TSI and US LEC. With respect to the Caller ID-Deluxe and Privacy Director services, BellSouth noted that these are voluntary services which are not mandated by either state or federal requirement which many local exchange companies, including on information and belief US LEC, do not offer.

The affidavit of Malika Blakely, Product Manager for Caller ID Deluxe, explained that the Privacy Director Service only intercepts calls if the caller's number is blocked and cannot be delivered. So long as the caller's number is delivered along with SS7 information, the call rings directly to the recipient's telephone. So long as the number is delivered, the name delivery has no impact on the operation of the Privacy Director Service. Caller ID Deluxe, by contrast, allows the recipient's phone to show the caller's name if BellSouth has the caller's name in its database or pays to "dip" into another database, such as that maintained by TSI. Caller ID Deluxe is a tariffed service, and the costs of maintaining its own database or "dipping" into another database are costs incurred by BellSouth to provide this service. At the time that BellSouth was negotiating and executing its contract with TSI, BellSouth did not know which carrier's customers were included in TSI's database. Ms. Blakely attached a copy of the Privacy Director tariff and the BellSouth/TSI contract.

Oral Argument

The oral argument was held as scheduled on December 9, 2003. The Public Staff was present as an intervenor, and supported the position of US LEC from its perspective as a representative of the using and consuming public, including the customers of both BellSouth and US LEC. In essence, the Public Staff argued that BellSouth's failure to retrieve and deliver the names of callers who use competitors results in a reduction of service to both the BellSouth customers and the US LEC subscribers. BellSouth and US LEC recapitulated and expanded upon the arguments made in their filings.

US LEC focused on its view that BellSouth has a statutory duty to fully provide the service it has undertaken to provide and that it is furthermore obligated to fully provide the Caller ID service under Section 5.5 of Attachment 3 of the BellSouth/US LEC interconnection agreement. US LEC noted that there were three contracts that are relevant to the provision of the service in this case—the contract between US LEC and BellSouth, the contract between BellSouth and TSI, and the contract between TSI and US LEC. The fact of the BellSouth Caller ID tariff offering is also relevant. US LEC noted that the BellSouth/TSI contract had been in effect for three years and had been renewed as late as July 2003. US LEC was not informed that BellSouth was no longer “dipping” with TSI; rather, it learned of this fact through the complaints of its customers. US LEC admitted that there are other database providers, but TSI is one with which it has chosen to do business. Prior to receiving complaints from customers, US LEC had no reason to know or believe that BellSouth had any problem with US LEC’s decision to use TSI as its database provider. BellSouth’s argument that its “dipping” with TSI is purely optional, even if true, is irrelevant because BellSouth has the obligation to provide fully the service it has undertaken to provide to its own customers and pursuant to the US LEC/BellSouth contract. The Commission has jurisdiction under G.S. 62-32 (Supervisory powers; rates and services), G.S. 62-42 (Compelling efficient service), and G.S. 62-73 (Complaints). US LEC has standing both because of the interest of its own customers and those of BellSouth also.

According to US LEC, BellSouth customers are, in effect, being deceived because they are paying for Caller ID services and expecting to receive the name information from customers of US LEC or other CLPs, while BellSouth’s own actions prevent delivery of this information. A bond is not appropriate in this case under G.S. 1A-1, Rule 65(c). The interests of the public should not depend on whether US LEC is able or willing to post a bond. The relief being requested is simply for BellSouth to provide the service it has undertaken to provide—if this can be done without “dipping” from TSI, US LEC has no objection to this, but the service should be fully provided.

With respect to Section 5.5 of Attachment 3, US LEC maintained that the provision that the parties are to provide LEC-to-LEC CCS to “enable full interoperability of CLASS features and functions” clearly creates an obligation upon the parties—and, more specifically in the instant case, upon BellSouth—to provide the Caller ID service fully, which it is not doing by not delivering caller names. BellSouth’s apparent view that the provision is “reciprocal” and contingent upon whether the other party offers comparable Caller ID service itself (a view which US LEC disputes) in any event falls to the ground because US LEC does in fact offer comparable Caller ID service to its customers.

BellSouth restated and amplified many of the arguments made in its filings, including the “standing” argument. BellSouth emphasized that the BellSouth/TSI contract is nonexclusive and does not require that BellSouth “dip” into TSI’s database. BellSouth furthermore professed that it had no knowledge that US LEC was part of TSI’s database when it stopped “dipping,” and it was BellSouth’s belief that US LEC

was not offering Caller ID service. BellSouth denied that Section 5.5 created any obligation to US LEC with respect to the matter at hand and instead emphasized what it believed to be the “reciprocal” nature of the provision with which, it argued, it was in full compliance.

On December 12, 2003, the Commission issued an Order Requiring Information from the parties—specifically, from US LEC a copy of its contract with TSI; from both US LEC and BellSouth, a statement of the pricing terms in their respective contracts with TSI; and, from all parties, a concise statement of their interpretation of the meaning of Section 5.5 of Attachment 3 of the BellSouth/US LEC interconnection agreement, with particular reference to the sentence containing the acronym TCAP.

Current Version of Section 5.5 of Attachment 3

The current version of Section 5.5 of Attachment 3 reads as follows:

Both parties will provide LEC-to-LEC Common Channel Signaling (“CCS”) to each other, where available, in conjunction with all traffic in order to enable full interoperability of CLASS features and functions except for call return. All CCS signaling parameters will be provided, including automatic number identification (“ANI”), originating line information (“OLI”), calling company category, charge number, etc. All privacy indicators will be honored, and each party will cooperate with each other on the exchange of Transactional Capabilities Application (“TCAP”) messages to facilitate full interoperability of CCS-based features between the respective networks.

The Parties will provide CCS to one another in conjunction with all trunk groups where applicable. The Companies may establish CCS interconnections either directly or through a third party. The Parties will exchange TCAP messages to facilitate full interoperability of CCS-based features between their respective networks, including all CLASS features and functions, to the extent each party offers such features and functions to its own end-users. All CCS signaling parameters will be provided including CPN. All privacy indicators will be honored.

Responses

US LEC provided the copy of the TSI/US LEC contract under seal as its Exhibit 1 and the pricing terms of that contract, also under seal, as Exhibit 2. With respect to Section 5.5, US LEC explained that this provision means that the parties will provide signaling to each other to permit the full interoperability of CLASS features. “CLASS” is an acronym for “customer local area signaling service,” of which calling name is one service. “Full interoperability” means that both parties will enable their respective networks to receive and deliver calling names and other CLASS features each party offers to its customers whenever its customer receive calls from or make calls to

customers of the other party. The importance of full interoperability is emphasized by its use twice in the section. It is US LEC's view that BellSouth has blocked full interoperability of the calling name CLASS features and has thereby breached the agreement. "TCAP" is an acronym for "Transactional Capabilities Application Part," and it provides the signaling function between network databases. The US LEC customer name is transmitted via TCAP messages over Common Channel Signaling (CCS) system interconnection.

The second paragraph of Section 5.5 provides that the CCS interconnection may be established directly or through a third party. US LEC chose to use a third party—viz., TSI. Before the agreement was breached, BellSouth sent a query to TSI via a TCAP message for the name of the US LEC customer each time a BellSouth customer who subscribed to Caller ID received a call from a US LEC customer. TSI responded to the query with a TCAP message containing the calling party's name from the database it maintains for US LEC and other carriers. The third sentence in the second paragraph again requires the parties to exchange TCAP messages to facilitate "full interoperability" of CCS-based features to its own customers. This sentence simply means that, to the extent that either party requires interoperability to provide a service, such as CNAM, the parties must exchange TCAP messaging to facilitate that service. US LEC offers CNAM service to its customers in North Carolina and elsewhere. The calling party's name is displayed on interstate and intrastate calls. BellSouth is refusing to retrieve US LEC customer name information from the TSI database and is instead retrieving outdated/expired information from its own database or, if the calling name is not on BellSouth's database, it is delivering the originating caller's city and state in lieu of the calling party's name. The final sentence of the section requires all CCS signaling parameters to be provided by the parties to each other to permit the interoperability required under the agreement.

Public Staff noted that there were two references to TCAP in Section 5.5. The first reference stated that the parties were agreeing to "cooperate with each other on the exchange" of TCAP messages, while the second reference repeats what is clearly stated in the first paragraph—that the "full interoperability of CLASS features and functions except Call Return" includes the exchange of TCAP messages. The additional language in the second reference ("to the extent each party offers such features and functions to its own end users") serves two functions. First, it limits the parties' obligations, under certain circumstances; and, second, it imposes an affirmative obligation to prevent discrimination. The language would limit BellSouth's obligation to offer the calling name of a US LEC subscriber to a BellSouth subscriber if BellSouth did not offer calling name display to its own end users. However, both BellSouth and US LEC offer calling name display to their own end users in one or more states in their service areas, so the additional language does not act to limit the parties' obligations to exchange TCAP messages. The more important function of this language is, however, to prevent discrimination in the provision of CCS features—that is, the circumstance in which one of the parties would undertake to provide the benefits of a CLASS service to its subscribers without also making the same service available to subscribers of the other party. Since BellSouth uses its name database to provide the calling names of its

own subscribers to its own calling name display subscribers, it is obligated under the terms of the agreement to cooperate with US LEC to provide the names of BellSouth subscribers to US LEC subscribers and to provide the names of US LEC subscribers to its calling name display subscribers.

BellSouth provided the pricing terms its contract with TSI. With respect to Section 5.5, BellSouth argued that the purpose of this provision was to ensure parity between competing entities by requiring both parties to reciprocate in exchanging TCAP messages and to allow their interconnecting networks to operate in a manner so that one provider cannot have a competitive advantage by offering a function or feature to its customers that a competing provider is operationally unable to provide. For example, if BellSouth were to receive TCAP messages from a CLP so that BellSouth could offer Caller ID-Deluxe with the other company's customer names, it could not deny the other company a reciprocal right to receive messages to provide a comparable-type service. The functions that a provider chooses to offer are business judgments. Nothing in Section 5.5 dictates how, or to what degree, any particular feature must be provided. It would be wrong to allow a competitor to dictate the cost of another provider's offerings. In the instant case, the tariff rate for BellSouth's Caller-ID Deluxe service is paid only by BellSouth's customers, and the costs for providing it are incurred only by BellSouth. Neither US LEC nor any other provider pays for this service. To allow a competitor to require BellSouth to incur costs for a service for which its customers do not pay would diverge interests in a way that is contrary to good regulatory policy and common sense.

Conclusions

The purpose of a preliminary injunction is to preserve the status quo pending a trial on the merits. Preliminary injunctions are temporary and are in effect only through the course of litigation. A preliminary injunction is appropriately issued in the discretion of the Commission where the complaining party is able to show a likelihood of success on the merits of its case and is also able to show that it is likely to suffer irreparable loss or irreparable harm to its rights unless an injunction is issued pending trial and final judgment on the merits of the case.

In this docket, US LEC has established a likelihood of success on the merits of its claim that BellSouth has breached its obligations under the parties' interconnection agreement. Section 5.5 of Attachment 3 of the BellSouth/US LEC Interconnection Agreement requires both parties to provide LEC-to-LEC CCS to each other in order to enable full interoperability of customer local area signaling service (CLASS) features and functions. CLASS encompasses a number of features, including calling name. The only CLASS feature excluded from the interoperability obligations under Section 5.5 of the Agreement is call return. Based on the language of Section 5.5, it is likely that the Commission will find that BellSouth and US LEC are obligated by the terms of their interconnection agreement to receive and deliver as part of their Caller ID with name service offerings¹, the names of each other's customers when one party's customers

¹ BellSouth calls this service Caller ID Deluxe.

call the other party's customers. US LEC has argued, and BellSouth has not denied, that since BellSouth's unilateral decision to cease to receive certain information from third-party provider, TSI, BellSouth either does not provide its "Caller ID with name subscribers" with caller name information when US LEC customers call them or it provides information that is outdated and inaccurate. Therefore, it appears likely that US LEC will be able to prove at hearing that BellSouth is not providing its Caller ID subscribers with caller name information for US LEC callers and that the failure to do so is a breach of its obligation under the Interconnection Agreement.

Further, Section 5.5 also provides that "each party will cooperate with each other" on the exchange of TCAP messages to facilitate full interoperability of CCS-based features between respective networks, including all CLASS features and functions with the exception of call return. Once it became aware that its actions impacted US LEC and US LEC customers, BellSouth's continued adherence to its unilateral action and refusal to deliver US LEC caller name information to BellSouth's Caller ID customers without attempting to work with US LEC to agree on mutually acceptable terms and conditions for obtaining and delivering caller names is likely a breach of its contractual duty to cooperate with US LEC to achieve full interoperability.

While BellSouth argued that full interoperability under Section 5.5 is somehow dependent or contingent on the reciprocity of both parties' exchanging TCAP messages and providing Caller ID service and that US LEC fails to meet such a reciprocity requirement, the Commission is not presently persuaded that this argument defeats US LEC's likelihood of success on its breach of contract claim. Reading Section 5.5 in its entirety leads the Commission to conclude that what BellSouth reads as a requirement that both parties must offer Caller ID services to their customers before the full interoperability language is invoked, is, as argued by the Public Staff and US LEC, a limiting clause that requires exchange of TCAP messages to the extent either party needs interoperability to provide a service it chooses to offer. The parties will act to facilitate full interoperability, but full interoperability only to the extent that a party needs it to offer a service of its choosing. That is to say, Section 5.5 does not impose interoperability that would require a party to provide a CLASS feature (such as caller name) to its customers when that feature is part of a service (such as Caller ID) that the party does not provide to its customers. The agreement does not require that either party provide a service that it chooses not to offer. However, even if the Commission accepted BellSouth's reciprocity argument as correct, US LEC has proffered that it does provide comparable Caller ID service in North Carolina and in other states where BellSouth is the incumbent provider. Therefore, if, by the terms of Section 5.5, interoperability is contingent upon reciprocity, it is likely that US LEC will be able to establish that it meets the reciprocity test.

US LEC and the Public Staff have also argued that BellSouth's failure to provide caller name information to its Caller ID Deluxe subscribers violates statutory obligations under N.C.G.S §§ 62-32, 62-42 and 62-118. Having found that US LEC is likely to succeed on its breach of contract claim, the Commission makes no comment regarding the likelihood of the movants' prevailing on these additional claims. The first part of the

two-part test to succeed on a motion for preliminary injunction is satisfied by US LEC's showing that it is likely to succeed on the merits of its claim for breach of the interconnection agreement.

US LEC has also established that it, as well as its customers, will suffer irreparable harm and loss unless an injunction is issued pending final resolution of the issues raised by its Complaint. US LEC's business customers are being harmed when their names are not delivered to BellSouth Caller ID subscribers that they call in the course of their business. They are often unable to reach the party being called because the recipient will not answer unless the caller is identified pursuant to the service the recipient has purchased from BellSouth. When the US LEC customer's name is not delivered as part of the Caller ID service, the recipient assumes the caller is someone who does not want its name revealed and who does not have a legitimate business reason to call or a prior business relationship with the recipient. In turn, US LEC's reputation as a local service provider is injured when its customers' caller names are not provided to BellSouth's Caller ID subscribers. It is highly likely that some US LEC customers, upon learning that they cannot have their caller names displayed because they receive their telephone service from US LEC instead of BellSouth, may come to believe that US LEC's service is inferior to BellSouth's or that US LEC cannot provide them with the quality of service that BellSouth's provides. US LEC represented that at least one of its large business customers discontinued its service with US LEC because of the inability to have its caller name delivered to BellSouth customers as long as it continued receiving service from US LEC. Thus, unless a preliminary injunction is issued and if BellSouth continues not to deliver caller name information to its Caller ID subscribers, there is a great likelihood that US LEC will suffer both economic loss and harm to its reputation as a reliable and quality provider of local telephone and telecommunications service.

In opposing the motion for a preliminary injunction, BellSouth argued that US LEC did not have standing. The Commission finds this argument without merit. US LEC has standing to bring an action for breach of the interconnection agreement to which both US LEC and BellSouth are parties. Further, US LEC and US LEC customers are the parties allegedly injured by BellSouth's failure or unwillingness to deliver caller name information to BellSouth's Caller ID subscribers. In addition, the Public Staff has intervened in the matter on behalf of US LEC customers, BellSouth customers, and the public. The Public Staff also seeks injunctive relief and agrees that BellSouth's own customers are injured by BellSouth's failure to provide complete and accurate Caller ID information, including caller name. BellSouth's Caller ID Deluxe customers are billed for receipt of this information and may be missing calls they want to receive because they are not receiving complete and accurate Caller ID information.

Accordingly, the Commission concludes that a preliminary injunction should issue pending a hearing on the merits. The Commission will not require the posting of a bond inasmuch as the Public Staff intervened in this matter and seeks injunctive relief on behalf of the using and consuming public. Protection of the public should not depend on whether US LEC is able to post a bond in this matter.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth is hereby ordered, by issuance of this preliminary injunction pending final determination on the merits, to return US LEC and its customers to the status quo that existed prior to its decision not to perform Caller ID queries utilizing the TSI database;
2. That BellSouth is hereby ordered to deliver complete and accurate Caller ID information, including caller name, of US LEC customers who call BellSouth customers in North Carolina that subscribe to BellSouth Caller ID service, as it did prior to its decision not to perform Caller ID queries utilizing the TSI database;
3. That BellSouth may obtain the caller name information for US LEC customers using any reasonable means it has available to it;
4. That an evidentiary hearing on US LEC's Complaint is set for 9:00 a.m., on Tuesday, January 6, 2004, in the Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina; and,
5. That, among other issues, the parties should be prepared to address at the evidentiary hearing the appropriate terms and conditions for transmission of caller name information between the parties.

ISSUED BY ORDER OF THE COMMISSION.

This the 23rd day of December, 2003.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

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